APPEAL NO. 93424

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On February 24, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He kept the record open until April 28, 1993, and then determined that appellant (claimant) has an impairment rating of seven percent, as found by the designated doctor. Claimant asserts that certain information was inadmissible because of carrier's failure to contest liability for the injury within 60 days, and that the report of the designated doctor is so flawed that it should not be presumed as accurate. Respondent (carrier) does not respond.

DECISION

Finding that the decision and order are sufficiently supported by the evidence, we affirm.

Claimant did not attend the hearing on February 24, 1993. This hearing only addressed the issue of correct impairment rating. Earlier, a contested case hearing was held on October 19, 1992, to consider whether carrier could contest compensability since it did not dispute the injury within 60 days. That hearing determined that the carrier had waived its right to contest compensability of the September 23, 1991, injury by not disputing within 60 days. Part of claimant's assertion in the case now before the Appeals Panel refers to the passage of that 60 days as making certain evidence inadmissible. Claimant specifically says that (Dr. C) (the carrier's doctor) report was ruled inadmissible; it was not ruled inadmissible by the hearing officer on February 24th, and if it were inadmissible in the earlier hearing, that would have been for purposes of contesting liability for the injury, not for purposes of determining an impairment rating. Similarly, claimant states that the designated doctor should not have been provided information because it is now beyond the 60 days, referencing the earlier hearing as to compensability. The issue of impairment (and maximum medical improvement [MMI]) is different from the issue of whether an injury was incurred in the course and scope of employment. Once the carrier has been found to be liable for the injury, whether on the basis of the facts of the injury or through the carrier's waiver of the issue of injury because of inaction, the later, different question of impairment rating may arise, and either party may contest it. The first hearing concluded that the carrier is liable for the injury; this hearing is concerned with how long the carrier is liable; it is very possible to use medical evidence in the latter whether or not it was used, or even existed at the time, in the former hearing.

The hearing officer found that the designated doctor, (Dr. A), in regard to his report as to impairment rating, was entitled to presumptive weight set forth in Article 8308-4.26 of the 1989 Act, because the great weight of other medical evidence was not to the contrary. Dr. A's original report was dated January 8, 1993, and found MMI on August 10, 1992, with seven percent impairment. Dr. A stated in that report that he reviewed reports of other doctors that performed testing such as EMG/nerve conduction studies and MRI. Dr. A also discussed his range of motion testing and findings. He comments that the MRI's in 1988, after claimant's previous back injury of August 1988, and June 23, 1992, show similar

findings with claimant's additional impairment after the injury before us as being seven percent.

The hearing officer then contacted both Dr. A and the treating doctor, (Dr. P) about the effect of the injury that was under consideration and about how each arrived at his rating. Dr. A's additional input is dated February 19, 1993, and was transmitted to the hearing officer on April 20, 1993. It indicates that Dr. A has reviewed the report of Dr. P dated December 15, 1992. Dr. A states that Dr. P's report gave a similar impairment rating to claimant on December 7, 1990, after the previous back injury. After the first injury, Dr. P rated the injury as 30%, and after the 1992 injury in question, Dr. P rated the impairment as 30% plus 13% for a total of 43% without using the combined value table. Dr. A referred to the Guides to the Evaluation of Permanent
Impairment, Third Edition, American Medical Association (AMA Guidelines) by page number and said these Guidelines were the basis for his seven percent rating.

The hearing officer asked Dr. P to apply the combined value table and to describe what he based claimant's impairment upon after the previous injury. Dr. P replied on March 18, 1993, that he could not say what percentage of impairment was attributable to the previous injury; he stated that the criteria for impairment under the prior law could be addressed by referencing a book, "Contemporary Conservative Care for Painful Spinal Disorders," by Dr. Mayer and others. He did not apply the combined value table to his rating of 43%.

Claimant questions Dr. A's "contradictions," such as giving an opinion without certain x-ray and CT scans. The Appeals Panel pointed out in Texas Workers' Compensation Commission Appeal No 93381, decided July 1, 1993, that the designated doctor had the discretion to choose whether to accept another doctor's interpretation of a test or to personally interpret the test him/herself. Claimant states that Dr. A's testing for impairment was limited, but does not say that Dr. A did not personally examine him. Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993, stated that the designated doctor must examine the claimant, but did not state that all tests must be conducted by that doctor. Claimant points out that Dr. A says treatment will still be necessary for claimant and that pain is a factor in the treatment. Texas Workers' Compensation Commission Appeal No 93300, decided June 3, 1993, indicated that MMI and an impairment rating may be given even when the patient is still in pain. (Medical care can continue after these points are reached.)

The hearing officer considered the six page initial designated doctor's report of Dr. A plus his three page report issued subsequently, which asserted compliance with the AMA Guidelines. Dr. A's reports do not reflect that his examination of the claimant was inadequate. In addition, Dr. C, who evaluated claimant for the carrier, said that claimant could go back to work in May, 1992; he could identify no objective findings based on the

new injury; he found MMI and no added impairment. The report of Dr. C is comparable to Dr. A's in attributing a great deal of claimant's problem to a previous injury. With Dr. P's explanation in reply to the hearing officer's letter taken into consideration with Dr. P's other reports, even he reflects that a large part of impairment was established by the previous injury.

The great weight of medical evidence other than that of the designated doctor was not contrary to that of the designated doctor, and the hearing officer did not err in applying the presumption found in Article 8308-4.26(g) of the 1989 Act to the designated doctor's opinion of an impairment rating. The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge